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No. 89-369

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a four-month time limit governs the Environmental Protection Agency's (EPA's) review of proposed revisions to State Implementation Plans (SIPs) under the Clean Air Act (42 U.S.C. 7410(a)(3)(A)).

2. Whether, if such a time limit is applicable, the proper remedy for EPA failure to take final action on a SIP revision within four months is to bar the United States from enforcing an existing SIP until EPA issues a final decision on the proposed revision.

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Cases:

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Cases – Continued: Page

Bethlehem Steel Corp. v. *EPA*, 638 F.2d 994 (7th Cir. 1980) 39
Blum v. *Bacon*, 457 U.S. 132 (1982) 15
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Costle v. *Pacific Legal Foundation*, 445 U.S. 198 (1980) 20
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Cases – Continued: Page

Illinois State Chamber of Commerce v. *EPA*, 775 F.2d 1141 (7th Cir. 1985) 5
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Michigan v. *Thomas*, 805 F.2d 176 (6th Cir. 1986) . 22
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Rodway v. *Dep't of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975) 20
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Cases – Continued: Page

United States v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989), petition for cert. pending, No. 89-104 ..... 11, 14, 25, 31, 34, 35, 41, 43
United States v. *Boccanfuso*, 882 F.2d 666 (2d Cir. 1989) 33
United States v. *Ford Motor Co*, 814 F.2d 1099 (6th Cir.), cert. denied, 484 U.S. 822 (1987) ....., 26, 42
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985) 20
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United States Steel Corp. v. *EPA*, 605 F.2d 283 (7th Cir.), cert. denied, 444 U.S. 1035 (1979) ... 20
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§ 307(b)(1), 42 U.S.C. 7607(b)(1) 29, 39
§ 307(b)(2), 42 U.S.C. 7607(b)(2) 29

Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 1-2
§ 107(a), 84 Stat. 1678 2
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§ 110(a)(1), 84 Stat. 1680 2
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§ 171(2), 91 Stat. 746 (42 U.S.C. 7501(2)) 3

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Miscellaneous:

J. Bromberg, *Clean Air Act Handbook* (1985) 21

Congressional Research Service:
1 *A Legislative History of the Clean Air Act Amendments of 1970* (Comm. Print 1974) .. 17
2 *A Legislative History of the Clean Air Act Amendments of 1970* (Comm. Print 1974) .. 18
4 *A Legislative History of the Clean Air Act Amendments of 1977* (Comm. Print 1978) 19

D. Currie, *Air Pollution: Federal Law and Analysis* (Supp. 1989) 26

EPA, *Report of Audit, Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions* Elk*8-11-0045-9100210 (March 1989) 23

EPA, Revised Guidelines on Enforcement of State Implementation Plan Violations Involving Proposed SIP Revisions (Aug. 29, 1989) 29

Executive Order No. 12,291, 46 Fed. Reg. 13,193 (1981) 21

Miscellaneous – Continued: Page

46 Fed. Reg. (1981):
p. 13,193 21
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47 Fed. Reg. (1982):
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50 Fed. Reg. (1985):
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55 Fed. Reg. (1990):
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1 W. Rodgers, *Environmental Law. Air and Water* (Supp. 1988) 26
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 876 F.2d 1060. The opinion of the district court (J.A. 119-125) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on June 7, 1989. The petition for a writ of certiorari was filed on September 5, 1989, and granted on December 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. 7401 et seq., are set out in the Appendix to petitioner's brief and in the Appendix to this brief.

STATEMENT

A. The Statutory Framework

1. In 1970, Congress enacted a comprehensive national program for combating air pollution. Clean Air Act Amendments

of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Before 1970, the federal role had been limited, and "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so." *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 64 (1975). The results of that approach, however, were "disappointing," and the 1970 Amendments "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Id.* at 64. Although States continued to "have the primary responsibility for assuring air quality within the entire geographic area comprising such State" (§ 107(a) of the Clean Air Act, 84 Stat. 1678), they were now required to comply with specific federal criteria concerning the content of the air standards and the timetable for reaching them. *Train*, 421 U.S. at 64-65.

The basic regime for this new approach to air pollution was set forth in Sections 109 and 110 of the revised Clean Air Act. Congress charged the EPA Administrator with developing "national * * * ambient air quality standards" (NAAQS). § 109(a)(1), 84 Stat. 1679; 42 U.S.C. 7409(a)(1).[1] The NAAQS were of two types—primary (those necessary "to protect the public health" (84 Stat. 1680)) and secondary (those necessary "to protect the public welfare" (*ibid.*)). The EPA Administrator was required to propose NAAQS for known air pollutants within 30 days, and finalize the standards within 90 days thereafter. § 109(a)(1); 42 U.S.C. 7409(a)(1). The revised Act then required each State to develop and submit to EPA, within nine months after promulgation of the NAAQS, a state implementation plan (SIP) to achieve and maintain the NAAQS within the State. § 110(a)(1), 84 Stat. 1680; 42 U.S.C. 7410(a)(1). For its part, EPA was then required to determine, within four months of the date required for submission of original SIPs, whether a SIP met certain statutory requirements (§ 110(a)(2), 84 Stat. 1680; 42 U.S.C. 7410(a)(2)), including attainment of applicable primary NAAQS, "as expeditiously as practicable" but generally no later than three years

[1] "Ambient air" is "the statute's term for the outdoor air used by the general public." *Train* v. *Natural Resources Defense Council*, 421 U.S. at 65.

from the date of approval of a SIP (§ 110(a)(2)(A), 84 Stat. 1680; 42 U.S.C. 7410(a)(2)(A)).

The 1970 Amendments also set forth a procedure for SIP revisions. The Act requires EPA to approve revisions to existing SIPs if it determines that a revision meets the requirements applicable to original SIPs, and that it was adopted by the State after notice and public hearings. § 110(a)(3), 84 Stat. 1681; 42 U.S.C. 7410(a)(3)(A).[2] Unlike the provision for review of original SIPs, the provision for review of SIP revisions contains no express time limit. Moreover, the 1970 Amendments specified that, for purposes of the Act, "an applicable implementation plan" is a plan which has been approved by EPA. § 110(d), 84 Stat. 1682; 42 U.S.C. 7410(d).

The 1970 Amendments provided various enforcement mechanisms. The revised Act empowers EPA to order sources of pollutants to comply with "an applicable implementation plan" (§ 113(a), 84 Stat. 1686; 42 U.S.C. 7413(a)) and to seek injunctive relief against a source violating such a plan or violating an EPA order (§ 113(b), 84 Stat. 1687; 42 U.S.C. 7413(b)). The Amendments also prescribed criminal penalties for knowing violations of "applicable implementation plan[s]" and EPA orders (§ 113(c), 84 Stat. 1687; 42 U.S.C. 7413(c)). In addition, Congress authorized citizen suits for injunctions against violators, in the absence of government enforcement (§ 304, 84 Stat. 1706; currently codified at 42 U.S.C. 7604).

2. In 1977, Congress again significantly amended the Clean Air Act. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. The legislation was, at least in part, a response to widespread failure to meet the attainment deadlines in the 1970 Amendments. See, *e.g.*, S. Rep. No. 127, 95th Cong., 1st Sess. 12 (1977). See also *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 847 (1984). Among other provisions, the 1977 Clean Air Act Amendments added to the Act the concept of a "nonattainment area"—an area where air quality falls short of NAAQS. § 171(2), 91 Stat. 746; 42

[2] Before 1974, this provision had been § 110(a)(3) of the Clean Air Act, rather than § 110(a)(3)(A). See Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 4(a), 88 Stat. 256.

U.S.C. 7501(2). The Amendments required each State containing a nonattainment area to prepare and secure EPA approval of a new SIP by July 1, 1979. §§ 110(a)(2)(I), 172(b), 91 Stat. 694, 746; 42 U.S.C. 7410(a)(2)(I), 7502(b). The deadline for attainment of the primary NAAQS in a nonattainment area was extended to December 31, 1982. § 172(a)(1), 91 Stat. 746; 42 U.S.C. 7502(a)(1). Further extensions were permitted for "photochemical oxidants" (ozone) and carbon monoxide, but only if the State demonstrated that attainment was not possible by 1982, despite the implementation of all reasonably available measures, and that attainment would be achieved "as expeditiously as practicable but not later than December 31, 1987." § 172(a)(2), 91 Stat. 746-747; 42 U.S.C. 7502(a)(2).[3] The nonattainment area SIPs, moreover, were required to contain specific provisions designed to achieve NAAQS as expeditiously as possible. See *Chevron*, 467 U.S. at 849. To this end, the revised Act required that the plan revisions must "provide for the implementation of all reasonably available control measures as expeditiously as practicable" and require, in the interim, "reasonable further progress" toward reductions in emissions. § 172(b)(2)-(3), 91 Stat. 747; 42 U.S.C. 7502(b)(2)-(3).

The 1977 Amendments also strengthened the Act's enforcement provisions. Congress authorized EPA to seek civil penalties; the Administrator could now bring an action in district court for civil penalties of up to $25,000 per day for violations of various provisions of the Act, including violations of an "applicable implementation plan." § 113(b), 91 Stat. 704; 42 U.S.C. 7413(b). In determining the amount of a civil penalty, moreover, the district court is directed to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." *Ibid.* Congress also gave the EPA additional authority to impose administrative noncompliance penalties; the Administrator could now assess administratively a noncompliance penalty against any "major stationary source"

[3] Petitioner's statement that "[f]or ozone the deadline is December 31, 1987" (Br. 4 n.1) is thus, at best, an incomplete statement of the pertinent statutory provision.

in violation of SIP emission limits. § 120, 91 Stat. 715-719; 42 U.S.C. 7420.[4] The penalty begins to accrue when EPA issues a Notice of Noncompliance (§ 120(d)(3)(C), 91 Stat. 718; 42 U.S.C. 7420(d)(3)(C)), and is intended to remove the economic benefit of delayed compliance and place polluters on the same economic footing as those who had limited their emissions through increased anti-pollution expenditures. § 120(d)(2)(A), 91 Stat. 718; 42 U.S.C. 7420(d)(2)(A). See also H.R. Rep. No. 294, 95th Cong., 1st Sess. 72 (1977).

B. The Proceedings In This Case

1. The entire Commonwealth of Massachusetts is a nonattainment area for the NAAQS regarding ozone. See 40 C.F.R. 81.322; J.A. 95. In 1980, EPA approved Massachusetts' proposed nonattainment area SIP. This SIP required painting operations at automobile assembly plants to meet increasingly stringent limits on emissions of volatile organic compounds (VOCs), which are substances that react with other chemicals in the atmosphere to form ozone.[5] Full compliance was required by December 31, 1985. Petitioner's plant in Framingham, Massachusetts is the only automobile assembly plant in the State. Pet. App. 6a; J.A. 29.

[4] A "major stationary source" is "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." 42 U.S.C. 7602(j).

[5] The D.C. Circuit has described the effects of ozone:

> Ozone is the primary cause of the ill effects associated with smog, of which it usually comprises 65-100%. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches. Due to its irritating nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. Ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading and weathering.

American Petroleum Institute v. *Costle*, 665 F.2d 1176,1181 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982). See also *Illinois State Chamber of Commerce* v. *EPA*, 775 F.2d 1141, 1143 (7th Cir. 1985) ("Ozone is a significant component of the health-endangering smog that is one product of modern industry and transportation").

2. a. On October 20, 1981, EPA published a policy statement discussing the automobile industry's development of new technologies for reducing VOC emissions, including conversion from lacquer paints to the basecoat/clearcoat process (BC/CC). 46 Fed. Reg. 51,386-51,388; J.A. 30-37. EPA announced that it would entertain proposed SIP revisions intended to allow automakers to install new technology; it would extend the date for compliance until 1986, with some plants requiring until 1987 to convert. J.A. 33-34. EPA cautioned, however, that SIP revisions would need to assure continued compliance with Sections 110 and 172 (J.A. 30); Section 172 requires, among other things, "the implementation of all reasonably available control technology as expeditiously as practicable" and "reasonable further progress" toward attainment "in the interim." § 172(b)(2)-(3); 42 U.S.C. 7502(b)(2), (3).[6]

b. Within ten days of EPA's policy statement, petitioner submitted requests consistent with the policy statement for three of its assembly plants in other States; it did not, however, submit such a request for its Framingham plant. Pet. App. 6a. More than three years later, in November 1984, petitioner requested that the State extend the December 31, 1985, compliance date by two years (to December 31, 1987) to give petitioner additional time to install emission controls on its lacquer coating lines. J.A. 38-40. The State did not, however, submit the request as a SIP revision to EPA.

Eight months later, in June 1985, petitioner changed its plans. At this point—six months before the ozone emission compliance deadline that had been in effect in Massachusetts for almost five years—petitioner proposed converting its Framingham plant to the basecoat/clearcoat process. It requested a delay of the SIP standard until the end of 1987 (the same date that it had requested for its earlier emission control proposal). J.A. 41-45.

[6] EPA also emphasized that the revisions would "need to be evaluated in light of their impact on the overall plan and the individual elements, including emission reductions necessary to demonstrate reasonable further progress toward attainment of standards." J.A. 31-32.

c. Massachusetts provided public notice and held a hearing on December 16, 1985, regarding petitioner's request for an extension of the SIP compliance deadline. At this hearing, an EPA representative expressed reservations about the proposed extension because, among other problems, the proposal made no attempt to limit emissions during the extension period. J.A. 61-62. On December 30, 1985, one day before the final compliance deadline in the SIP that had been in place since October 1980, Massachusetts submitted to EPA a proposed SIP revision extending petitioner's compliance date for ozone emissions on automobile coating lines to August 31, 1987. J.A. 50-74; Pet. App. 6a-7a.

3. a. EPA's Region I office began reviewing the proposed SIP revision. At the same time, EPA, the Commonwealth, and petitioner also undertook negotiations in an attempt to resolve petitioner's noncompliance with the existing SIP by means of a Delayed Compliance Order under Section 113(d) of the Act (42 U.S.C. 7413(d)). Pet. App. 7a. Such an Order would have allowed an extension of the compliance date while requiring an enforceable schedule of steps toward compliance and protection from unnecessary emissions during the interim, neither of which was required by Massachusetts' proposed SIP revison.

b. On May 30, 1986, five months after its submission of the proposed SIP revision, Massachusetts requested that EPA delay action on the SIP revision until June 20, 1986, to allow negotiations to continue on a Delayed Compliance Order, which the Commonwealth considered a better way to resolve the matter. J.A. 89-90. Shortly after that period, on July 2, 1986, EPA Region I sent a draft proposal to disapprove the SIP revision to EPA Headquarters. J.A. 88.

c. On August 14, 1986, EPA sent petitioner a notice of violation. The notice informed petitioner that it was in violation of the applicable SIP. J.A. 75-82. EPA pointed to data establishing that, from January 1, 1986 to June 30, 1986, the VOC content in petitioner's operations at the Framingham plant considerably exceeded the SIP's emission limits. J.A. 79.[7]

[7] EPA pointed out that the SIP limit for topcoating was 2.8 pounds of VOC per gallon of coating (excluding water) and that petitioner had used top-

EPA's cover letter noted the ongoing negotiations between EPA, the State, and petitioner regarding a Delayed Compliance Order, but warned that, if no agreement was reached in 30 days, EPA would "decide which other enforcement options to pursue under Sections 113 and 120 of the Clean Air Act." J.A. 75-76. EPA urged petitioner to confer with the Agency and "discuss the most expeditious method * * * to come into compliance with the applicable SIP." J.A. 76.

d. The negotiations regarding the Delayed Compliance Order did not bear fruit, and the draft proposal to disapprove the SIP revision, which had been sent on July 2, 1986, was accordingly reviewed by EPA Headquarters. Pursuant to Executive Order 12291, it was also submitted to the Office of Management and Budget (OMB). J.A. 96. On December 1, 1986, EPA's notice of proposed disapproval was published in the Federal Register. 51 Fed. Reg. 43,394; J.A. 91-96. In the Notice, EPA pointed out (J.A. 93-95) that the proposed SIP revision failed to meet several of the criteria for deferral established in EPA's 1981 policy statement, and in particular failed to require the implementation of reasonably available control technology as expeditiously as practicable, as required by the Act (§ 172(b)(2), (3); 42 U.S.C. 7502(b)(2), (3)).

e. On June 30, 1987, following receipt of public comment on the proposed SIP revision, Region I transmitted to EPA Headquarters a draft of a final decision disapproving the proposed SIP revision. J.A. 88. This draft was reviewed at EPA Headquarters and again at OMB. 53 Fed. Reg. 36,014. On May 5, 1988, petitioner submitted 405 pages of comments and attachments regarding the proposed disapproval, to which EPA responded in detail. See 53 Fed. Reg. 36,012 n.1; *General Motors* v. *Reilly*, No. 88-2123 (1st Cir.) (C.A. Dkt. Nos. 69-111). On September 4, 1988, EPA issued a final decision disapproving the proposed SIP revision; the decision was

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coatings with an average content of 5.02 pounds of VOC per gallon of coating (excluding water); EPA also pointed out that the SIP limit for final repair coatings was 4.8 pounds of VOC per gallon of coating (excluding water), and that petitioner had used final repair coatings with an average of 6.18 pounds of VOC per gallon of coating (excluding water). J.A. 79.

published in the Federal Register on September 16, 1988. 53 Fed. Reg. 36,011; see also Pet. App. 7a-8a.[8]

2. On August 17, 1987, the United States filed a civil enforcement action against petitioner under Section 113 of the Act (42 U.S.C. 7413). J.A. 7-13. The complaint alleged continuous violations by petitioner—beginning on January 1, 1986—of the VOC emission standards of the existing SIP. J.A. 11. EPA had sent a notice of violation to petitioner almost exactly one year before filing the complaint. EPA had published (some eight months earlier) its proposed disapproval of the SIP revision in the Federal Register; however, EPA Headquarters had not yet acted on Region I's draft final decision of disapproval.

On petitioner's motion, the district court dismissed the action in its entirety. The district court construed Section 110(a)(3) to impose a four-month time limit on EPA's review of a SIP revision, and held that, because it exceeded that deadline, EPA was barred from enforcing the existing SIP for any violations that occurred before final agency action on the proposed SIP revision. J.A. 119-125.

3. The court of appeals reversed and remanded for further consideration. The court first agreed with the district court that the four-month deadline on EPA's review of original SIPs should also apply to the review of SIP revisions. Although it found the question "admittedly * * * a close one" (Pet. App. 11a), the court concluded that Congress would not have wanted the States' policy choices "to be held hostage to the EPA's schedule." *Id.* at 12a. The court emphasized that, "by imposing a four-month deadline on the EPA," it avoided "the possibility that the Agency would have assigned a lower priority to SIP revisions from First Circuit states than to those from states in circuits that had imposed a deadline." *Ibid.*

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[8] On November 11, 1988, petitioner filed a petition for review of EPA's denial of the proposed SIP revision in the court of appeals. *General Motors* v. *Reilly*, No. 88-2123 (1st Cir.). That action has been stayed pending EPA action on petitioner's request for reconsideration by the agency, and pending decision in this case.

The court of appeals disagreed, however, with the Fifth Circuit's holding in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (1987), that EPA is barred from enforcing an existing SIP for the interval between the end of the four-month period and the time when the agency acts on the proposed SIP revision. The court reasoned that an enforcement bar is too drastic a remedy for agency delay, especially since it penalizes the public's interest in clean air. Pet. App. 14a. The court also found it likely that EPA would frequently need longer than four months to issue a considered ruling, and would therefore miss the deadline even with the incentive of an enforcement bar. *Id.* at 13a-14a. At the same time, the court rejected the D.C. Circuit's alternative approach in *Duquesne Light Co.* v. *EPA*, 698 F.2d 456 (1983). As the court explained, the D.C. Circuit had held that, if a SIP revision is ultimately rejected, "penalties may be assessed retroactively, with interest, for the entire period after the deadline." Pet. App. 13a. Seeking to "steer a middle course between these two extremes" (Pet. App. 14a), the court concluded that the appropriate remedies for agency inaction are those provided by the Clean Air Act itself: (1) a suit to compel Agency action under Section 304(a)(2) (42 U.S.C. 7604(a)(2)), or (2) a request pursuant to Section 113(b) (42 U.S.C. 7413(b)) for reduction or elimination of penalties during any period in which unreasonable agency delay resulted in prejudice. *Id.* at 14a-15a.

With respect to the enforcement action in this case, the second remedy was applicable. The court noted that Section 113(b) directs district courts, in assessing any penalties, to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." Pet. App. 15a. Thus, the district court could "decline to award penalties for * * * unwarranted delay." *Ibid.* The court of appeals noted, "if on remand in this case, the district court finds that [petitioner] was prejudiced by the Agency's lengthy review and that the delay was not justified or that some portion of the delay was not justified, it may reduce the penalties in a manner it sees fit." *Ibid.* The court thus remanded to permit the district court to consider

petitioner's claims regarding "the equities of this case" (*id.* at 17a) and for assessment of appropriate penalties, if any.[9]

SUMMARY OF ARGUMENT

Section 113 of the Clean Air Act expressly authorizes EPA to bring actions for injunctive relief and civil penalties against any person in violation of "any requirement of an applicable implementation plan." 42 U.S.C. 7413(a)(1). Petitioner seeks a court-imposed rule that would limit this explicit grant of authority by barring enforcement whenever a proposed revision to the applicable SIP has been submitted to EPA and the agency has not taken final action on the proposal within four months. The court of appeals properly rejected this attempt to impose a limit which Congress never prescribed on EPA's enforcement authority.

1. Petitioner's argument begins with the flawed premise that the four-month limit for review of original SIPs under Section 110(a)(2) applies to review of proposed SIP revisions under Section 110(a)(3)(A). The language of the statute does not support this interpetation. Section 110(a)(3)(A) requires that the proposed revision "meet[ ] the requirements" of an original SIP (42 U.S.C. 7410(a)(3)(A)); it does not require that EPA act on a proposed revision within four months. The four-month time limit for review of original SIPs was part of an elaborate timetable established in 1970 to ensure that emission limitations, many of which were already formulated, could be put into place with maximum speed. There is no evidence that Congress expected or required equal haste for SIP revision proposals. The latter frequently involve relaxation or delay of strict emission

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[9] The Sixth Circuit has now agreed with the First Circuit's analysis in this case, and has also rejected the *American Cyanamid* enforcement bar. See *United States* v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989), petition for cert. pending, No. 89-1104. Both this case and *Alcan Foil* arose in the context of Section 113 enforcement proceedings; *Duquesne Light* and *American Cyanamid* arose in the context of Section 120 administrative assessments. Neither the First Circuit nor the Sixth Circuit rested its decision on that distinction. See Pet. App. 16a & n.4; 889 F.2d at 1518.

control requirements. These are, obviously, complicated issues requiring careful scrutiny by the agency. Rather than the four-month time limit, the statutory standard for agency timeliness in acting on SIP revision proposals is the Administrative Procedure Act's standard of reasonableness (5 U.S.C. 555 and 706(1)). And, in view of the applicable administrative and statutory requirements, as well as the nature and complexity of the issues, review of SIP revisions for longer than four months is often entirely reasonable.

2. Even if a four-month time limit obtains for review of SIP revisions, neither the statute nor the legislative history reveals any intent to eviscerate EPA's authority, after expiration of that period, to enforce the statute. Section 113 clearly states that EPA may bring an action to enforce the "applicable implementation plan" (42 U.S.C. 7413(b)(2)); this Court in *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 92 (1975), and many lower courts, have made clear that the existing SIP is the applicable plan until both the State and EPA have approved a revision. See § 110(d); 42 U.S.C. 7410(d). Accordingly, three Circuits—the First, Sixth, and D.C. Circuits—have now concluded that EPA does not lose authority to enforce the existing SIP even if a SIP revision has been pending for more than four months.

The Fifth Circuit's contrary conclusion in *American Cyanamid* is unsupported by statutory language or legislative history, and conflicts with this Court's decision in *Brock* v. *Pierce County,* 476 U.S. 253 (1986). *Brock* makes clear that courts should not assume that Congress intends agencies to lose their power to act when they fail to meet statutory deadlines, particularly when there are "less drastic" remedies available. As the court below found, less drastic remedies are available to deal with untimely agency action: either a suit by the State or the source to compel agency action, or a request by the source for a reduction of civil penalties where agency delay has led to prejudice.

Petitioner's asserted policy reasons for an enforcement bar cannot override the statutory language and are, in any event, unpersuasive. The States' role under the Clean Air Act is adequately protected by the remedies specifically provided by Congress to address agency delay; there is no need to infer an additional remedy not provided by statute and no warrant for doing so. Indeed, barring the United States from enforcing the applicable SIP would thwart the clear congressional intent to remove incentives for delaying compliance with the strict deadlines of the Act. What is more, a judicially-created bar would also disserve the States' and the public's interest in cleaner air.

Nor is an enforcement bar needed to address the possibility that an enforcement action might undermine even-handed consideration of a proposed SIP revision. That speculative possibility does not stem from agency delay, but from Congress's decision to assign both enforcement and SIP review responsibilities to the same agency. Even if a decision on a SIP revision were to be improperly influenced by the pendency of an enforcement action, Congress provided an adequate remedy in the form of direct review of the SIP denial in the courts of appeals, a remedy which petitioner has invoked in this case. Any possible prejudice suffered by a defendant in an enforcement action by reason of EPA delay in reviewing a SIP revision can be addressed by the court in assessing penalties. The argument that an enforcement bar is needed to punish the agency for delay also fails, because it is the public, not EPA, that would be hurt if applicable SIPs could not be enforced.

Petitioner's policy arguments not only fail to persuade, they misconceive the role of the courts in interpreting statutes. Where, as here, Congress has conferred upon an agency an explicit mandate to enforce "applicable implementation plans," it is not the appropriate province of the judiciary to carve out exceptions in order to create policy-based incentives for administrative management.

ARGUMENT

I. THE FOUR-MONTH LIMIT FOR REVIEW OF ORIGINAL SIPS UNDER SECTION 110(a)(2) DOES NOT APPLY TO REVIEW OF PROPOSED SIP REVISIONS UNDER SECTION 110(a)(3)(A)

As the court of appeals recognized, Section 110(a)(3)(A), which governs review of SIP revisions, does not "contain language explicitly imposing a four-month deadline on the Agency." Pet. App. 5a. Stating that the question is "a close one" (*id.* at 11a), that it is "unlikely * * * that Congress * * * intended for the states' legitimate policy choices to be held hostage to the EPA's schedule" (*id.* at 12a), and that the States in the First Circuit thus would not be disadvantaged (*ibid.*), the court agreed with the rule adopted in other Circuits applying the four-month time limit for consideration of original SIPs in Section 110(a)(2) (42 U.S.C. 7410(a)(2)) to EPA's consideration of SIP revisions in Section 110(a)(3)(A) (42 U.S.C. 7410(a)(3)(A)).[10] In so concluding, the court erred. In light of the fact that the statutory language does not provide a four-month deadline and the further fact that in the Clean Air Act, Congress was explicit about other deadlines, the application of the Section 110(a)(2) deadline for initial agency approval of SIPs as a Section 110(a)(3)(A) deadline for subsequent agency review of SIP revisions is unwarranted. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ").[11]

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[10] See Pet. App. 12a (citing *American Cyanamid*, 810 F.2d at 495; *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d 648, 651 n.1 (2d Cir. 1982); and *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983)). In *United States* v. *Alcan Foil Products*, *supra*, the Sixth Circuit also concluded that a four-month limit applies to SIP revisions. 889 F.2d at 1517-1518.

[11] Contrary to petitioner's contention (Br. 12 n.13), the question of the applicability of a four-month deadline to review of SIP revisions is properly before this Court. The non-applicability of such a deadline is an alternative ground for affirming the judgment of the court of appeals, which reversed the dismissal of the enforcement action and remanded for consideration of penalties. The "prevailing party" is "of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 475 n.20 (1979). See also *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). In this case, the issue has been not only properly raised below, but explicitly addressed by both the district court and the court of appeals. See J.A. 122-125; Pet. App. 9a-12a.

1. As always, " 'the starting point for interpreting a statute is the language of the statute itself.' " *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1989). Indeed, the text itself is the critical element of the interpretive inquiry, since it is the text itself which is law. In this case, the pertinent textual analysis is of Section 110(a)(2), which governs original SIP submissions and explicitly imposes a four-month deadline on agency review, and Section 110(a)(3)(A), which governs SIP revisions and imposes no such deadline.

Section 110(a)(2) contains two sentences. The first provides, "The Administrator shall, within four months after the date required for submission of a plan under paragraph (1) [§ 110(a)(1); 42 U.S.C. 7410(a)(1)], approve or disapprove such plan, or any portion thereof." The four-month review period thus begins with the date specified in Section 110(a)(1)—"nine months after the promulgation of a national primary ambient air quality standard" or "a national ambient air quality secondary standard." 42 U.S.C. 7410(a)(1). Both Section 110(a)(1) and Section 110(a)(2) were part of an integrated timetable established in 1970 to ensure that delays in formulating the original SIPs did not interfere with the 1975 attainment deadline.[12]

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[12] This original schedule included (1) proposed NAAQS "within 30 days after December 31, 1970" (§ 109(a)(1)(A); 42 U.S.C. 7409(a)(1)(A)); (2) final NAAQS "no later than 90 days after initial publication of such proposed standards" (§ 109(a)(1)(B); 42 U.S.C. 7409(a)(1)(B)); (3) original SIP submissions "within nine months after the promulgation" of NAAQS (§ 110(a)(1); 42 U.S.C. 7410(a)(1)); (4) EPA action on SIP submissions within four months (§ 110(a)(2); 42 U.S.C. 7410(a)(2)); and (5) attainment of the primary NAAQS "as expeditiously as practicable but * * * in no case later than three years"

The second sentence of Section 110(a)(2) provides: "The Administrator shall approve such [state implementation] plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that" specified requirements are satisfied, as set forth in Section 110(a)(2)(A)-(K). These requirements are the heart of the federal SIP review process, establishing the minimum standards for all state plans.

Section 110(a)(3)(A), which governs SIP revisions, provides in its entirety, that

> [t]he Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) [§ 110(a)(2); 42 U.S.C. 7410(a)(2)] and has been adopted by the State after reasonable notice and public hearings.

The phrasing of this provision precisely parallels the second sentence of Section 110(a)(2). Both refer to the substantive standards that must be satisfied before a plan or revision is approved, and to the requirement that the State provide notice and public hearing. But nothing in Section 110(a)(3)(A) can properly be read as referring to or incorporating the first sentence of Section 110(a)(2), which requires EPA to act within four months "after the date required for submission of a plan under" § 110(a)(1).[13] Indeed, the language of the Section 110(a)(2) deadline—"within four months after the date required for submission of a plan"—makes no sense in the context of a SIP revision because revisions are not "required." Although petitioner reads Section 110(a)(3)(A) as if it said that "the Administrator shall approve or disapprove any revision no later than four months after its submission," the statute in fact contains no such language.[14]

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from the date of approval of the original SIP (§ 110(a)(2)(A); 42 U.S.C. 7410(a)(2)(A)).

[13] The "it" in § 110(a)(3)(A), which must "meet[ ] the requirements of paragraph (2)," plainly refers to the SIP revision, not to the Administrator.

[14] Significantly, the very next provision of the Act, relating to certain SIP revisions for fuel burning stationary sources, contains just such language. See

2. Congress in 1970 desired to put the basic framework of the Act—the NAAQS and the original state plans implementing them—in place as quickly as possible.[15] The four-month deadline for approval of original SIPs was part of a scheme enacted by Congress to get air pollution controls in place swiftly.[16]

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§ 110(a)(3)(B); 42 U.S.C. 7410(a)(3)(B) ("The Administrator shall approve or disapprove any revision no later than three months after its submission."). Clearly, Congress knew how to impose time limits on EPA processing of SIP revisions when it wanted to do so. The three-month limit in Section 110(a)(3)(B) is practicable because a proposed SIP revision under that Section can be submitted only *after* the Administrator has determined that the SIP can be revised "without interfering with the attainment and maintenance of any national ambient air quality standard," and has so notified the State. Hence, the difficult determination of whether NAAQS will be preserved will already have been made. Indeed, Section 110(a)(3)(B) requires the Administrator to make *that* determination—whether state plans are capable of revision without interfering with the attainment of NAAQS—not within a specified three-month period, but merely "[a]s soon as practicable."

Other examples of explicit deadlines in the Clean Air Act are the deadlines for imposition of a federal implementation plan (§ 110(c)(1); 42 U.S.C. 7410(c)(1)) and review of a State-issued delayed compliance order (§ 113(d); 42 U.S.C. 7413(d)).

[15] The legislative history reflects this sense of urgency. See, *e.g.*, Congressional Research Service, 1 *A Legislative History of the Clean Air Amendments of 1970*, at 124-125 (Comm. Print 1974) (remarks of Senator Muskie on consideration of the conference report) ("Let me now review briefly where we were in September • • •. Unless we recognized the crisis and generated a sense of urgency, national lead times to find and apply controls [and] measures could melt away without any chance for a rational solution to the air pollution problem. • • • [N]ational air quality goals • • • had to be achieved within specific time frames • • •."). See also *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976) ("[T]he 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution.").

[16] See S. Rep. No. 1196, 91st Cong., 2d Sess. 14 (1970) ("In order to insure achievement of air quality necessary to protect the health of persons within the period specified in the bill, time constraints would be placed on the Secretary's review and approval authority. • • • The bill would provide that the Secretary must approve or reject any implementation plan submitted by a State within four months of the date required for its submission."). In that version of the legislation, the Secretary of Health, Education, and Welfare, who had previously been responsible for federal air pollution control efforts, was given responsibility for reviewing SIP submissions. See *id.* at 52.

Meeting short deadlines for these initial steps was considered possible in part because many States had already developed ambient air standards for metropolitan areas, some of those standards had already received federal approval, and various implementation plans were already in preparation or had been completed under earlier versions of the Clean Air Act.[17]

There is no evidence, however, that Congress expected the same short deadlines to apply once the original SIPs were in place to protect public health. Indeed, the SIP revision authority in Section 110(a)(3) was enacted virtually without comment. The logical inference is that, once the protective framework of original SIPs was in place, the States and EPA would not be expected to maintain the same hectic pace on matters like SIP revisions, which often, as in the case here, involve relaxation or delay of strict emission control requirements.

3. Petitioner contends (Br. 13 n.14) that the Court should use Section 110(g) (42 U.S.C. 7410(g)) as an aid to construction of Sections 110(a)(2) and 110(a)(3)(A). This provision, added by the 1977 Amendments, permits the Governor of a State to issue a four-month suspension of portions of a SIP where the State has submitted a SIP revision "which the Administrator has not approved or disapproved under this section within the required four month period," and which is necessary to prevent substantial unemployment resulting from a plant closing. 42 U.S.C. 7410(g). Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 107(b), 91 Stat. 692-693. By its terms, this provision does not in any way amend Section 110(a)(2) or Section 110(a)(3)(A). Moreover, there is no legislative history that suggests, and no reason to believe, that the new provision was designed to clarify the relationship between Sections 110(a)(2) and 110(a)(3)(A), or to impose a new deadline on SIP revision processing.

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[17] See CRS, 2 *A Legislative History of the Clean Air Act Amendments of 1970*, at 1036-1038 (Comm. Print 1974) (testimony of Charles C. Johnson, Administrator, Environmental Health Services, Department of Health, Education, and Welfare). The 1970 Amendments specifically provided that any pre-enactment state implementation plan could be approved and remain in effect if consistent with the Amendments. See 84 Stat. 1713; 42 U.S.C. 7410 note.

Petitioner's position is apparently that reference in the new provision to "the required four month period" is an indication that Congress, in 1977, interpreted the 1970 Amendments as having imposed such a time limit on SIP revision determinations. Even if there were any evidence that Congress was interpreting the 1970 Amendments, the views of the 1977 Congress would obviously not be probative of the legislative intent in 1970.[18] But there is no such evidence. The reference to the "required four month period" was inserted by the Conference Committee, and the legislative history of the 1977 Amendments does not explain its meaning. See H.R. Conf. Rep. 564, 95th Cong., 1st Sess. 125 (1977). The phrase may well be a residual reference to the four-month period within which the Administrator was required to approve or disapprove a "temporary emergency suspension" under the House version of the legislation,[19] and Section 110(g) is most reasonably interpreted as contemplating a four-month period for EPA review of such emergency SIP revisions. That interpretation reasonably reconciles all pertinent textual provisions, and is not precluded by any language of the statute or expression of congressional intent. Indeed, the focus of the drafters of subsection (g) was on situations of economic emergency; there is simply no evidence that they intended to speak to the day-to-day processing of routine requests for extensions or variances.

4. Even without a four-month deadline, EPA remains subject to statutory requirements of timeliness. The Administrative

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[18] See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63 n.4 (1987) ("Respondents point to provisions in the 1987 Act and statements in its legislative history • • •. The conclusions of the 99th Congress, however, are hardly probative of the intent of the 92d Congress."); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958) ("At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. • • • [S]uch interpretation has very little, if any, significance").

[19] See H.R. 6161, 95th Cong., 1st Sess. § 115 (1977) (reprinted in CRS, 4 *A Legislative History of the Clean Air Act Amendments of 1977*, at 2324 (Comm. Print 1978)).

Procedure Act requires agencies to conclude matters "within a reasonable time" (5 U.S.C. 555) and provides a remedy for agency action "unreasonably delayed" (5 U.S.C. 706(1)). See *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980). Measured by this statutory requirement, EPA review of SIP revision proposals for longer than four months is—in the usual case—not unreasonable.

In most instances, there is no realistic possibility that EPA can appropriately take final action on proposed SIP revisions within four months. The Administrative Procedure Act's (APA) requirement for notice and public comment alone is likely to use up most or all of the allotted period. See *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 170-171 (6th Cir. 1973) (APA notice and comment requirements apply to EPA decision on SIPs), cert. denied, 425 U.S. 934 (1976); *United States Steel Corp.* v. *EPA*, 605 F.2d 283, 288 (7th Cir.) (public comment and response to comments can take several months), cert. denied, 444 U.S. 1035 (1979). Requests to extend the customary 30-day comment period are not unusual and are routinely granted. As befits the purposes served by public participation, additional comments during such an extension may considerably enhance the decisionmaking process. See, *e.g.*, *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1181 (6th Cir. 1985) (comment period extended and SIP revision rejected because additional comments established inaccuracies in methodology used to justify proposed revision). Moreover, the agency must "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Rodway* v. *Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975). In many cases, as here (53 Fed. Reg. 36,012 n.1 (1988)), comments are received after the close of the comment period, and considered and addressed by the Agency. To have any hope of meeting a four-month deadline, EPA would have to issue a proposed decision almost immediately after receipt of the SIP revision. That would hardly be conducive to reasoned decisionmaking, and indeed would subvert the important supervisory role that Congress intended EPA to

carry out. Nor would such precipitous action further the federal-state partnership embodied in the Act. In some cases, it makes more sense to negotiate with a State to bring about an approvable SIP revision, rather than deny an inadequate proposal outright. Additionally, a State may want EPA to hold a matter in abeyance. In this very case, for instance, the Commonwealth requested EPA to delay processing of the SIP revision while it attempted to negotiate a Delayed Compliance Order with petitioner. J.A. 89-90. If a strict four-month rule applied, EPA would have to reject even reasonable requests by States for staying its hand. There is no reason to believe that Congress would have intended to usher in such an implausible regime.

Several other factors likewise contribute to the time required for SIP revision review. Because the various States use widely different methodologies (see J. Bromberg, *Clean Air Act Handbook* 110-111 (1985)), primary review of SIP revisions is carried out by the regional offices of EPA which are familiar with the situation in each State. In many instances, however, SIP revision proposals will raise policy questions with nation-wide implications; hence, review by EPA Headquarters is also important. J.A. 98; see also *State Implementation Plan Processing Reform; Notice of Procedural Changes*, 54 Fed. Reg. 2214, 2215 (1989) (SIP Processing Reform). Disapprovals and partial approvals also must undergo Office of Management and Budget review under Executive Order 12,291, 46 Fed. Reg. 13,193 (1981), before being published as final decisions in the Federal Register. See SIP Processing Reform, 54 Fed. Reg. 2215 (1989). This OMB review can take several months.[20]

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[20] See Letter from Joseph A. Cannon, EPA Associate Administrator, Policy and Resource Management to Hon. Sam. B. Hall, Chairman, House Subcommittee on Administrative Law and Governmental Relations (May 26, 1983), reprinted in *Regulatory Reform Act: Hearings Before the Subcomm. on Administration Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 1561-1562 (1983).

Furthermore, the analysis required to evaluate the merits of a proposed SIP revision is frequently complex and resource intensive. For example, a typical SIP revision for a single source of volatile organic compounds in an ozone nonattainment area (the case here) requires EPA to compare the source's proposed control technology with control technology of which EPA is aware for other similar sources, and determine whether the compliance schedule is as expeditious as practicable in light of the proposed technology, alternative technologies, and special circumstances at the source. 42 U.S.C. 7502(b)(2); J.A. 84-85. EPA must determine whether the proposed revision will assure that the State will continue to make "reasonable further progress" each year that is "sufficient * * * to provide for attainment of the applicable national ambient air quality standard by the date required." 42 U.S.C. 7501(1), 7502(b)(3). This requires an analysis of the State's reported reductions in emissions and the effect the proposed revision will have on continued reductions, which typically requires complex mathematical modeling. J.A. 84-85.[21]

Contrary to petitioner's repeated suggestion that EPA has been either indifferent or willfully dilatory with regard to SIP revision review,[22] the issue of delays in SIP revision review has been a subject of continuing concern to the Agency. Between 1983 and 1989, the Agency processed more than 1600 SIP-related actions—an average of almost 350 per year. SIP Processing Reform, 54 Fed. Reg. 2215. In 1985, the Agency issued internal guidelines setting a 14-month timetable for action on most proposed SIP revisions. Office of Air Quality Planning and Standards, EPA, *Guidelines on Processing SIP Revisions (And*

[21] The requirements that SIPs in nonattainment areas provide for the use of "reasonably available control technology" (RACT) to reduce emissions and that they provide for "reasonable further progress" in controlling emissions during the interim before compliance (42 U.S.C. 7502(b)(3)) were added by the 1977 Amendments; they require EPA to make a more detailed inquiry into a State's choice of emission limitations. See, *e.g.*, *Michigan* v. *Thomas*, 805 F.2d 176, 184-185 (6th Cir. 1986).

[22] See, *e.g.*, Br. 11, 12, 14, 18, 22.

111(d) Plans) (1985) (J.A. 103-111). The Agency concluded that this guideline represented a reasonable accommodation of the public interest in (and the Agency's statutory responsibility for) careful review of SIP revision proposals, as well as States' and sources' interest in expeditious review.[23] Because the Agency remained concerned about continuing problems of delays, however, EPA announced in 1989 extensive changes in SIP revision review to expedite Agency review and achieve better compliance with the Agency's own timeliness goals. See SIP Processing Reform, 54 Fed. Reg. 2214-2226 (1989). After notice and comment on these changes, EPA has now issued a final rule and revised guidelines regarding its SIP review procedures. The revised procedures recognize that SIP revision proposals vary widely, and set forth a sliding scale of three months to fourteen months for Agency review of most SIP revisions, depending on their nature and complexity (which in some instances may necessitate a period of longer than fourteen months). See 55 Fed. Reg. 5824, 5826-5828 (1990).[24]

It may be that, despite these Agency efforts, particular SIP revision reviews have been subject to unwarranted delay, or will be in the future. The pertinent statutory measure, however, is the APA's standard of reasonableness, not a four-month

[23] Cf. *United Steelworkers of America* v. *Rubber Manufacturers Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (accepting Occupational Safety and Health Administration's proposed 14-month schedule for completing rulemaking because agency "obviously cannot know at present how many comments it will receive or the nature of those comments," and because, given the need for careful consideration of complex issues, "judicial imposition of an overly hasty timetable at this stage would ill serve the public interest").

[24] In its condemnation of EPA, petitioner misstates a finding in an internal Agency audit. According to petitioner, the Agency audit found that the average time for SIP revision review is 30 months. Br. 29. In fact, however, the audit found that 30 months is the average time only for review of SIP revisions in which a disapproval is contemplated; those are, of course, the revisions that require the most time and are the most contested. See EPA, *Report of Audit, Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions*, EIK•8-11-0045-9100210 (March 1985) 20-21 (analyzing length of time for "pending disapprovals").

deadline that is not to be found in the language of Section 110(a)(3)(A).[25]

II. EVEN IF THERE IS A FOUR-MONTH TIME LIMIT FOR REVIEW OF SIP REVISION PROPOSALS, EPA IS NOT BARRED FROM ENFORCING THE TERMS OF AN EXISTING SIP ONCE THAT DEADLINE HAS PASSED

If (contrary to our view) the Section 110(a)(2) deadline does apply to Section 110(a)(3)(A) revisions, the court of appeals nonetheless correctly concluded that EPA's failure to meet the deadline should not lead to a bar of enforcement actions for violations of the original SIP until the Agency's final action on the proposed revision. A claim that a statute's enforcement should be barred because an agency has missed a deadline for regulatory action must be resolved by "examin[ing] carefully the statutory language and legislative history to determine whether Congress did indeed desire this somewhat incongruous result." *Brock* v. *Pierce County*, 476 U.S. 253, 258 (1986). Neither the statute nor the legislative history reveals any congressional intent to bar enforcement when EPA fails to act within a specified period; instead, as the court of appeals concluded, less drastic remedies to address problems of Agency delay are already provided by statute.

[25] Amici Golden West Refining Co., et al., contend (Br. 7 n.4) that "EPA acknowledged the four month limit applied to SIP revisions" in regulations implementing Section 120. What Golden West mistakenly refers to as "proposed regulations" was actually a final rule modifying EPA's Section 120 regulations in response to the D.C. Circuit's *Duquesne Light* decision. 50 Fed. Reg. 36,732 (1985). With respect to the four-month deadline, EPA merely repeated the holding of *Duquesne Light* and cited the decision. 50 Fed. Reg. 36,733 (1985). This recognition of a court decision obviously does not amount to an "acknowledge[ment]" or a concession. See *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 83 n.25 (1980). See also SIP Processing Reform, 54 Fed. Reg. 2215 n.1 (1989) (reiterating Agency view that four month deadline "does not apply to SIP revisions").

A. There Is No Support In The Language Or Legislative History Of The Clean Air Act For An Enforcement Bar

The language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2); 42 U.S.C. 7413(b)(2).[26] Without question, the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision. See § 110(d); 42 U.S.C. 7410(d) ("For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under [§ 110(a); 42 U.S.C. 7410(a)] or promulgated under [§ 110(c); 42 U.S.C. 7410(c)] and which implements the requirements of this section.".[27] This Court has emphasized the continuing applicability of an existing SIP while a SIP revision proposal is pending:

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the [Environmental Protection] Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.

Train v. *Natural Resources Defense Council*, 421 U.S. 60, 92 (1975). The courts of appeals have similarly recognized that the approved SIP is the applicable implementation plan even after a SIP revision has been proposed.[28]

[26] EPA may bring the action 30 days after notice of a violation. If the EPA has, pursuant to 42 U.S.C. 7413(a)(2), assumed enforcement of a SIP from the State because of state enforcement failures, the 30-day period is not necessary. 42 U.S.C. 7413(b)(2).

[27] The reference to Section 110(c) is to situations in which, because of state failure to comply with SIP submission requirements, the Administrator promulgates a SIP on the State's behalf. See 42 U.S.C. 7410(c).

[28] See *Alcan Foil*, 889 F.2d at 1519 ("[A] proposed revision is exactly what its name implies – a proposal, and nothing more."); *Duquesne Light*, 698 F.2d

In *American Cyanamid*, the Fifth Circuit recognized that the proposed SIP revision does not displace the existing SIP as the applicable plan (810 F.2d at 495), but nevertheless concluded that EPA should be barred from enforcing the existing SIP if the Agency has not acted on a proposed revision within four months. That court decided for policy reasons that an enforcement bar was necessary to penalize EPA for "contumaciousness," to preserve the role of the States under the Act, and to assure even-handed consideration of SIP revision requests. 810 F.2d at 499-500. The court made virtually no attempt to ground its enforcement bar in a specific statutory provision, or in specific evidence of legislative history. And, in fact, there is no evidence that Congress either intended or provided such an enforcement bar. In carving an exception out of EPA's general statutory enforcement authority, the *American Cyanamid* rule is "contrary to what the statute says." [29]

Nothing in the statute qualifies EPA's authority to enforce the "applicable implementation plan" in this circumstance. Indeed, Congress enacted an explicit enforcement bar elsewhere in the statute[30] – a fact which further rebuts the notion that an implicit enforcement bar was somehow intended if EPA misses a deadline under Section 110(a)(3)(A). See *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 309 (1989) ("[W]e are not at liberty to create an exception where Congress has declined to do so."); *Russello* v. *United States*, 464 U.S. at 23. Furthermore, reading an enforcement bar into Section 110(a)(3)(A) would render superfluous the explicit and limited provision of Section 110(g) (42 U.S.C. 7410(g)), which Congress enacted in 1977 to address the situation in which a pending SIP revision has not been acted on by EPA and the State believes that the waiver is necessary to prevent substantial unemployment due to plant closings. In that Section, Congress has granted authority to a Governor to suspend the existing SIP after four months. As the court of appeals recognized (Pet. App. 18a n.6), there would have been no reason for Congress to add that Section if the existing SIP automatically became unenforceable at the end of that period.[31]

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at 471 (same); *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1084 (3d Cir. 1987) (company is obliged to comply with existing compliance deadlines during pendency of SIP revision); *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir.) ("the original emission limit remains fully enforceable until a revision or variance is approved by both the State and EPA"), cert. denied, 484 U.S.C. 822 (1987); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 812 (D.C. Cir. 1975) (proposed SIP revision has no legal effect until approved by EPA); *Natural Resources Defense Council* v. *EPA*, 478 F.2d 875, 886 (1st Cir. 1972) (same).

[29] D. Currie, *Air Pollution: Federal Law and Analysis* § 8.07 n.14 (Supp. 1989). See also 1 W. Rodgers, *Environmental Law: Air and Water* § 3.39 (Supp. 1988) (enforcement bar is a "limitation invented by *American Cyanamid*").

[30] Section 113(d)(10); 42 U.S.C. 7413(d)(10), contains an express enforcement bar when Delayed Compliance Orders are in effect: it provides that, during the period of the Order and where the source is in compliance with its terms, "no Federal enforcement action pursuant to this section and no action under section 7604 of this title [providing for citizen suits] shall be pursued against such owner or operator based upon noncompliance during the period the order is in effect with the requirements for the source covered by such order."

Section 113(d)(2); 42 U.S.C. 7413(d)(2), moreover, provides that a Delayed Compliance Order issued by a State to a "source other than a major stationary source" is effective until the Administrator disapproves it. The same Section provides that orders issued to major stationary sources are not effective until approved by EPA. This indicates that Congress is well aware of the difference between agency approvals that are a condition precedent to effectiveness of a State-issued order and those that are a condition subsequent. Petitioner here is seeking, in essence, to change a statutory condition precedent to a condition subsequent. The fact that the Fifth Circuit has now suggested that its *American Cyanamid* rule applies if EPA has not acted on a Delayed Compliance Order to a major stationary source within a specified period (*General Motors Corp* v. *EPA*, 871 F.2d 495, 505 (5th Cir. 1989)) does not vitiate this explicit statutory distinction.

[31] In response to this point, petitioner maintains (Br. 27 n.34) that a Governor may issue a four-month suspension order as soon as the request is submitted, that the suspension would run concurrently with the four-month period for EPA review, and that the *American Cyanamid* bar would run after the expiration of that period. Section 110(g), however, does not contain a provision specifying that the Governor's suspension order takes effect immediately; Section 110(f), in contrast, which concerns energy emergencies and which was passed at the same time as Section 110(g), contains precisely such language. See 42 U.S.C. 7410(f)(1) (after President's determination of emergency,

Instead of relying on specific statutory provisions or legislative history to justify an enforcement bar, the *American Cyanamid* court referred to the States' important role in "the statutory scheme" (810 F.2d at 500) and to the congressional finding that " 'the prevention and control of air pollution * * * is the primary responsibility of States and local governments' " (810 F.2d at 500-501, quoting 42 U.S.C. 7401(a)(3)). Petitioner similarly relies on "the statute's carefully crafted balance of state and federal authority." Br. 22. This general emphasis on the role of the States, however, does not supply a proper statutory anchor for the enforcement bar. Moreover, while the States retain important responsibilities under the Act, the States' "primary responsibility" is to be carried out subject to significant oversight by the federal government. Section 110(a), in particular, gives final authority over SIPs and SIP revisions to EPA. See *Train* v. *Natural Resources Defense Council*, 421 U.S. at 92. Since Congress made EPA approval a condition precedent to the effectiveness of a SIP revision, there will *always* be a period during which a State's choice of emission controls will have to await approval by EPA. The result of the *American Cyanamid* rule is that a proposed SIP revision becomes, in effect, the applicable standard after four months in the absence of agency

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Governor's suspension order "may take effect immediately"). The Conference Report, moreover, firmly rebuts petitioner's strained reading of Section 110(g) by stating an intent to "limit the Governor's economic emergency suspension authority to a case in which * * * the Administrator has failed to approve or disapprove such plan revision within the required 4-month period." H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 125 (1977). Clearly, the Administrator cannot be said to have "failed" until the four-month period is over; thus a Governor's ability to order a suspension comes into effect only after the four-month period of EPA review, and would be entirely unnecessary if Congress intended a general *American Cyanamid* bar if EPA does not act in four months.

This analysis, of course, proceeds from the premise that a general four-month deadline is intended by Section 110(a)(3)(A). As we have explained (pp. 14-24, *supra*), we believe that four-month review of SIP revisions is required only for such emergency suspensions.

disapproval. But there is simply no support in the statute for such a conclusion.[32]

B. Less Drastic Remedies Than An Enforcement Bar Are Available To Address Agency Delay

In the absence of a specific statutory provision or legislative history suggesting that Congress intended an enforcement bar, petitioner maintains that an enforcement bar should be imposed for various policy reasons. Petitioner urges that such a bar is needed to protect the States' role under the Act (Br. 20-24, 31-34), to protect industry from uncertainty (Br. 34-37), and to discipline the Agency (Br. 37-40). These policy arguments are more properly presented to Congress than to the courts. They

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[32] Amici National Governors' Association, et al. recognize that "[a] complete bar to enforcement proceedings is contrary to Congress's carefully crafted scheme." Br. 18 n.17. The Association et al. nevertheless argue (Br. 18-19) that a district court should bar enforcement unless EPA establishes to the court's satisfaction a basis for disapproving the pending SIP revision. While that proposal is less draconian than the *American Cyanamid* bar, it suffers equally from the disability of having no support in the statute (which unambiguously provides that an existing SIP remains the governing legal standard pending EPA approval of a proposed revision, see pp. 25-26, *supra*). In addition, it conflicts with Congress's decision to vest exclusive review of EPA's decisions on SIP revisions in the courts of appeals. § 307(b)(1); 42 U.S.C. 7607(b)(1); see *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980). (Amici's reference to Section 307(b)(2), 42 U.S.C. 7607(b)(2), which prohibits review in civil or criminal enforcement proceedings of actions on which court of appeals review could have been obtained under Section 307(b)(1), is unavailing because that prohibition does not confer jurisdiction on the district courts to review SIP revisions.) In any event, Amici's concern that EPA should not enforce the existing SIP if the proposed SIP revision meets the statutory criteria for approval is already addressed by agency enforcement policy. Under that policy, EPA usually does not initiate enforcement actions until it has made a preliminary determination that a pending SIP revision cannot be approved. See EPA, *Revised Guidance on Enforcement of State Implementation Plan Violations Involving Proposed SIP Revisions* 3-6 (Aug. 29, 1989). (Copies of this document have been served on petitioner and lodged with the Clerk of the Court.) In this case, for instance, the enforcement action was not filed until after the proposed disapproval had been published in the Federal Register. See J.A. 91-96.

are, in any event, unpersuasive—especially because explicit statutory provisions already provide less drastic remedies than an enforcement bar, remedies that, unlike petitioner's blunderbuss approach, also preserve the basic statutory protection of the public health.

1. Petitioner's argument about the propriety of an enforcement bar as a remedy (Br. 24-30, 40-45) begins with a fundamental misconception. Petitioner fails to appreciate the exceptional nature of the "remedy" it seeks, and of the rule imposed by the *American Cyanamid* court. In the absence of explicit statutory language divesting an agency of the power to enforce an Act of Congress, courts should be wary of assuming that Congress intended such a result. The principles that govern this inquiry were set out in *Brock* v. *Pierce County*, 476 U.S. 253 (1986). That litigation arose out of an attempt by the Secretary of Labor to recoup misspent job training funds after a government audit of the County's expenditures; the County argued that recovery was barred because the Secretary had failed to complete his investigation and issue a final determination regarding the matter within 120 days, as required by the pertinent statute. *Id.* at 257. Citing "the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided' " (476 U.S. at 260), this Court emphasized the strong presumption against concluding that Congress intended to bar an agency from acting if it missed a deadline for regulatory action (*ibid.*):

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

The Court explained that a "less drastic remedy" for failure to meet a mandatory deadline would be a suit to " 'compel agency action unlawfully withheld or unreasonably delayed,' " under

the Administrative Procedure Act, 5 U.S.C. 706(1). 476 U.S. at 260 n.7.

The reasoning of *Brock* is fully applicable to this case.[33] Here, as in *Brock*, "[t]here is simply no indication in the statute or its legislative history that Congress intended to remove the [agency's] enforcement powers" if it fails to act in a timely fashion. 476 U.S. at 266.[34] As the court of appeals concluded, and as we shall show, there are less drastic remedies (including but not limited to suits under 5 U.S.C. 706(1)) for addressing untimely action on SIP revisions. See also *Alcan Foil*, 889 F.2d at 1520-1521 ("Clearly remedies less drastic than dismissal are available for EPA's failure to act within four months.").

Petitioner contends (Br. 26) that the reasoning of *Brock* is not applicable because EPA can lift the enforcement bar by taking final actions on proposed SIP revisions. This asserted distinction is inadequate. During the enforcement bar, the Agency would be stripped of its explicit statutory power to enforce applicable clean air requirements; the need for judicial reluctance

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[33] Although *American Cyanamid* was decided some nine months after *Brock*, it failed to advert to that decision. Both the court below (Pet. App. 16a) and the Sixth Circuit in *Alcan Foil* (889 F.2d at 1520) recognized the applicability of *Brock* to the claim that failure to meet a statutory deadline for regulatory action bars agency enforcement of that statute.

[34] As in *Brock*, 476 U.S. at 265, Congress's concern has been that the United States has not been aggressive enough in enforcing the statute, not that enforcement targets were being treated too harshly. See, *e.g.*, S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970) ("the [enforcement] provisions of existing law, although less than adequate, have not been used to the fullest extent practicable"); S. Rep. No. 127, 95th Cong., 1st Sess. 52 (1977) ("[d]espite the recalcitrance of some source owners and operators toward expeditiously complying with requirements under the act, few criminal actions have been brought • • •; [t]he enforcement of the Clean Air Act for the past seven years has been minimal at best • • •"); H.R. Rep. No. 294, *supra*, at 71-72 ("[s]tate and local enforcement efforts to date ha[ve] been largely ineffective in bringing about compliance • • •. The adequacy of Federal enforcement efforts was also questioned. • • • [M]any steps need to be taken to improve and expedite Federal, State, and local enforcement activities."). See also *Ohio Environmental Council* v. *United States District Court*, 565 F.2d 393, 397 (6th Cir. 1977) (noting "the strong Congressional policy in favor of prompt enforcement of the Act").

to conclude that an agency's failure "to observe a procedural requirement voids subsequent agency action, especially where important public rights are at stake" (*Brock*, 476 U.S. at 260) is therefore directly relevant. That EPA could ultimately act on a proposed revision (and thus regain its enforcement authority) does not mitigate the fact that it would have been deprived of "its power to act" (*ibid.*) with respect to Clean Air Act violations in the interim—and could be similarly deprived again by submission of another proposed revision relating to the same source. Indeed, Congress has specifically emphasized the importance of imposing monetary penalties to remove the economic benefits of noncompliance and to "place polluters on the same economic footing as those who had limited their emissions through increased anti-pollution expenditures." *Duquesne Light*, 698 F.2d at 463, citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 72-79 (1977). If EPA were barred from collecting penalties for some period of non-compliance with an applicable SIP, this congressional purpose would be irretrievably thwarted, notwithstanding the possibility of prospective relief once EPA is able to take final action on the SIP revision. Contrary to petitioner's advocacy of the enforcement bar, *Brock* counsels that, in the absence of explicit congressional intent, such a frustration of the basic statutory purpose—and such an exceptional result from a failure to observe a deadline for regulatory action—should not be countenanced.[33]

2. Proceeding from this misconception about the nature of the rule it advocates, petitioner advances policy arguments to support the enforcement bar. Petitioner's first policy argument (Br. 20-24) is that an enforcement bar is necessary to preserve

[33] As we have explained (pp. 19-22, *supra*), EPA's inability to take final action within four months is often due to factors beyond the agency's control, such as the requirement for public comment and the need to accommodate State requests for delay. Cf. *Brock* v. *Pierce County*, 476 U.S. at 261 ("[T]he Secretary's ability to complete [his statutory duty] within 120 days is subject to factors beyond his control."). Indeed, the deadline in *Brock*—120 days—is similar to the four-month deadline here, and the process of reviewing SIP revisions is at least as complex as the Secretary's responsibility to resolve the matter of misspent funds at issue in *Brock*.

the partnership between the state and federal governments that the Clean Air Act creates. As an initial matter, it is incongruous for petitioner to be asserting that interest in this case because the Commonwealth of Massachusetts has stated unequivocally in this litigation that, in its view, an *American Cyanamid* enforcement bar should not be imposed. See Massachusetts C.A. Amicus Br. 10-15; Pet. App. 12a. Petitioner thus seeks to assert the State's interest in a case in which the State itself has come to exactly the opposite conclusion.

In any event, an enforcement bar would be unlikely to further the asserted goal of a co-operative relationship between the States and the federal government. Instead, it would place a premium on hurried and inflexible decision-making. In this case, for instance, an enforcement bar would have argued strongly in favor of rejecting the Commonwealth's request for additional time for negotiations. Cf. *Georgia* v. *United States*, 411 U.S. 526, 540-541 (1973) (requiring the Attorney General to act on state reapportionment plans within the 60 day deadline provided in the Voting Rights Act, rather than allowing him to suspend running of period while States submitted additional pertinent information, "would only add acrimony to the administration" of the Act).

To the extent that States are legitimately aggrieved by EPA delay in SIP revision review, moreover, adequate alternative remedies are available. The ruling below contemplates the ability to compel EPA action, if it is unreasonably delayed. *Brock* suggests (476 U.S. at 260 & n.7) that this is precisely the sort of "less drastic remed[y]" that renders an enforcement bar unnecessary. See also *Council of Commuter Organizations* v. *Thomas*, 799 F.2d at 888 (remedy for undue delay on SIP revisions is suit to compel action under Section 304(a)); *United States* v. *Boccanfuso*, 882 F.2d 666, 671-672 (2d Cir. 1989) (Corps of Engineers cannot be estopped from enforcing Clean Water Act on account of its failure to follow deadline contained in its regulations; suit under APA provides "less drastic remedy"). Furthermore, this remedy has the advantage of being

available in all SIP revision cases, not just those few that may implicate enforcement actions.[36]

Under the approach taken by the court of appeals, moreover, there is a substantial incentive for timely agency action because, pursuant to Section 113(b) (42 U.S.C. 7413(b)), the penalties EPA may obtain can be reduced if the source can show that it complied with a proposed SIP revision that was subject to an unreasonable and prejudicial delay. Pet. App. 15a. Like an action to compel agency action – and unlike an enforcement bar – this remedy is explicitly provided by statute. It is also more appropriately tailored to the asserted problem of agency delay than an automatic enforcement bar, which would take effect no matter how reasonable the delay and whether or not the delay caused any prejudice. Although, as petitioner notes (Br. 41),

[36] Two types of actions to compel agency action should be distinguished – a suit to compel agency action under the Clean Air Act (§ 304(a)(2); 42 U.S.C. 7604(a)(2)) and a suit to compel agency action under the Administrative Procedure Act (5 U.S.C. 706(1)). The Clean Air Act provision authorizes a citizen suit "where there is alleged a failure of the Administrator to perform any act or duty • • • which is not discretionary." 42 U.S.C. 7604(a)(2). "In order to impose a clear-cut nondiscretionary duty [for purposes of Section 304(a)(2)] • • • a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." *Sierra Club* v. *Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987), quoting from *Natural Resources Defense Council* v. *Train*, 510 F.2d 692, 712 (D.C. Cir. 1974). If there is a categorical mandate in the statute that EPA act on a SIP revision within four months, the remedy to compel agency action would lie under Section 304(a)(2). See Pet. App. 14a (noting that Section 304(a) provides a remedy to compel timely action on SIP revision); *Alcan Foil*, 889 F.2d at 1520-1521 (same); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d at 888 (same). However, if the four-month deadline is in the statute as a "guidepost" rather than as a categorical mandate (as suggested by the court of appeals, Pet. App. 15a), the remedy would be under the APA, rather than Section 304(a)(2). *Sierra Club* v. *Thomas*, 828 F.2d at 788 n.39, 792 n.62; cf. *National Congress of Hispanic American Citizens* v. *Usery*, 554 F.2d 1196 (D.C. Cir. 1977); *National Congress of Hispanic American Citizens* v. *Marshall*, 626 F.2d 882, 891 (D.C. Cir. 1979). And, if a four-month deadline does not apply at all, suits to compel agency action unreasonably delayed may still be brought under the APA. *Sierra Club* v. *Thomas*, 828 F.2d at 796-797; *Cutler* v. *Hayes*, 818 F.2d 879, 895 & n.137 (D.C. Cir. 1987). Under any of these interpretations, judicial relief is available to compel agency action unjustifiably delayed.

this remedy will require judicial inquiry in enforcement cases, it is the kind of judicial inquiry in enforcement actions that the statute contemplates. See 42 U.S.C. 7413(b).[37]

States may also use non-judicial remedies to protect their interest in timely action on SIP-revision proposals. The States can and have expressed their concerns directly to EPA. The agency, in response, has implemented significant reforms designed to speed up the SIP review process. Indeed, EPA's recent SIP Process Reform is a product of a task force made up of State and EPA officials. See 54 Fed. Reg. 2215-2216 (1989). Carrying out the recommendations of the task force, EPA has implemented significant changes in its SIP processing procedures, including: review of proposed SIP revisions for completeness against specific criteria, and a requirement of prompt modification of incomplete submittals; delegation of decisional authority to Regional Administrators for SIP actions which are not nationally significant; identification of minor revisions which do not require notice and comment; use of expedited notice and comment procedures for other revision proposals; and provision for "grandfathering" of SIP revisions prepared in

[37] Indeed, the *Alcan Foil* court, while expressing skepticism about the efficacy of a suit to compel agency action, found the assessment-of-penalties provision itself a sufficient alternative remedy, and one already provided by statute. 889 F.2d at 1520-1521.

The Brief Amcius Curiae of the Chamber of Commerce of the United States charges (Br. 15) that EPA engaged in "calculated conduct" to deprive the State of Kentucky of its statutory prerogatives, by allegedly delaying action on a SIP revision until applicable requirements changed in a way that undercut the proposed revision. This contention was raised by Alcan Foil for the first time during EPA's appeal to the Sixth Circuit, and was sharply disputed by EPA. The court of appeals did not resolve the issue, noting that it should be considered by the district court on remand. 889 F.2d at 1521. As a general matter, it seems plain that penalties would be unwarranted for a period of prejudicial delay that was caused solely by the deliberate conduct of the agency. Even if a delay was not deliberate, we agree that the source's good faith in complying with a clearly approvable SIP revision would be a factor the district court should consider in determining whether to assess penalties. Conversely, if the proposed SIP revision is clearly deficient, a source's reliance on it would not warrant a reduction in penalties.

good faith by a State but which may become deficient because of a change in EPA policy subsequent to state submission. *Id.* at 2217-2220. These changes, brought about by a cooperative State-federal effort, should go far toward meeting any state concerns about excessive delay.

At the same time, the interest of all States – and of the general public – in clean air would be undermined by an enforcement bar. As Massachusetts itself put it in arguing against an enforcement bar in the court of appeals, "[s]ince the existing SIP is not suspended in any sense by the pendency of a proposed revision and remains the valid standard * * * EPA must be able to enforce it." Massachusetts C.A. Amicus Br. 11. See also Pet. App. 16a ("We find it significant that not even the Commonwealth argues for an enforcement bar, thus recognizing that its interests occasionally must yield to the overriding goal of improving our nation's air."). Furthermore, an enforcement bar would provide an incentive for quick action only in SIP revision review cases where enforcement is implicated, *i.e.*, cases where the proposed SIP revision loosens restrictions or deadlines. It could thus have the perverse result of encouraging the Agency to concentrate scarce resources on SIP revisions that relax air quality requirements, drawing resources away from the many SIP revisions that tighten requirements or deadlines.[38]

3. Petitioner's second policy argument (Br. 34-37) is that an enforcement bar is necessary to avoid "seriously negative impacts on regulated industries." *Id.* at 34. This contention is unfounded.

The thrust of petitioner's objection is that industries are subject to "conflicting federal and state regulatory requirements." Br. 34. This asserted "conflict," however, stems from the Act's requirement that EPA approve a state SIP revision before it can become effective. Thus, as petitioner recognizes (Br. 34 n.43), there will always be a period during which a State-proposed revision and a federally-approved SIP will differ. If federal and

[38] Petitioner specifically urges (Br. 25-26) that EPA should give priority attention to those SIP revisions that are relevant to enforcement actions. Congress, however, has given no indication that EPA should so order its priorities.

state requirements are actually in conflict, however, by virtue of the federal requirement being more stringent than the state requirement, then the federal requirement clearly controls under basic preemption principles. See, *e.g.*, *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, 109 S. Ct. 1262, 1273 (1989); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963).[39] Moreover, the Clean Air Act itself makes clear that the approved SIP is the "applicable implementation plan" until a revision is approved by EPA (§ 110(d); 42 U.S.C. 7410(d)).[40]

Even if there were a problem with inconsistent obligations, however, an enforcement bar is not well-tailored to address it. For one thing, it would operate even where, as here, there is no threat of inconsistent state enforcement. For another, the "certainty" it promises would be illusory because the source would be subject to the possibility of a citizen suit to enforce the existing SIP even if EPA's hands were tied.[41] Instead of producing

[39] This principle fully applies to petitioner's hypothetical example (Br. 35 n.45) of conflicting equipment requirements: in the case of a direct conflict, the federal requirement controls. To the extent petitioner suggests that its hypothetical describes this case, petitioner is mistaken. The Massachusetts SIP contained emission limitations for sources of pollutants, effective December 31, 1985. The choice of methodologies (and equipment) for meeting that limitation was the source's. See J.A. 29.

[40] If the proposed revision is *more* stringent than the approved SIP, and if it is immediately applicable as a matter of state law, the state law is enforceable (42 U.S.C. 7416). In such a circumstance, compliance with the more stringent state requirement would subsume compliance with, and not "conflict" with, the less stringent federal requirement.

[41] The Clean Air Act provides that a citizen may file an injunctive action against any source "alleged to be in violation of * * * an emission standard or limitation under this chapter," which is defined to include "a schedule or timetable of compliance" and "any condition or requirement under an applicable implementation plan relating to * * * air quality maintenance plans." §§ 304(a)(1), (f)(1), and (f)(3); 42 U.S.C. 7604(a)(1), (f)(1), and (f)(3). Although the *American Cyanamid* court had no occasion to consider whether a citizen suit to enforce the applicable implementation plan would also be barred if EPA takes more than four months to act on a SIP revision proposal, that court's concerns to penalize EPA for its delay and to insure against improper rejection of a SIP revision logically would not apply to citizens

certainty, an enforcement bar would lead to a situation where enforcement may or may not take place depending on whether there exists a citizen group willing and able to mount the challenge. Cf. Amicus Br. of National Governors Ass'n, et al. 18 n.17 ("It would be anomalous to create a situation in which States could enforce, private citizens could enforce; but the expert federal agency with explicit statutory authority could not.").[42]

Petitioner's additional suggestion (Br. 36) that an enforcement bar is needed to protect companies which "undertake improved compliance strategies" is also unpersuasive. EPA can bring an action only when the source fails to comply with the existing SIP. If the source is truly undertaking "improved" compliance, this problem should not arise. To the extent that it does arise—because, as petitioner claims, non-compliance with the existing SIP is justified by long-term investments in better compliance technologies and by interim compliance with the proposed SIP revision—the possible reduction of penalties in Section 113(b) is once again an adequate remedy. Such claims go to the "equities of [the] case" (Pet. App. 17a) and the "seriousness of the violation" (§ 113(b); 42 U.S.C. 7413(b)) that are part of the district court's consideration of penalties.[43]

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bringing an enforcement action. Moreover, it would violate the language and spirit of Section 304 to bar citizen suits merely because EPA could not bring an action. Congress spelled out the limits on citizens suits with specificity; such an action is barred where EPA "is diligently prosecuting a civil action" (§ 304(b)(1)(B); 42 U.S.C. 7604(b)(1)(B)), but not where EPA has been disqualified from doing so because of its delay.

[42] To reduce any differences between state and federal requirements while a SIP revision is pending, EPA has provided States with the option of "parallel processing" in which the state and federal processes would proceed simultaneously. See 47 Fed. Reg. 27,073-27,074 (1982). Contrary to the statement of amici Motor Vehicle Manufacturers Association et al. (Br. 14 & n.14), EPA has never "discontinued" the parallel processing option, and the procedure is used when a State appropriately chooses to exercise that option. See, *e.g.*, 54 Fed. Reg. 14,969 (1989).

[43] Petitioner's contentions about its own efforts at "improved compliance" (Br. 36; see also Br. 6) can of course be appropriately presented to the district court. In light of petitioner's submission of its claim to this Court as a justification for an across-the-board enforcement bar, however, it may be notable that petitioner's decision to replace the existing lacquer lines with a BC/CC system was made explicitly to "enable the plant to produce vehicles with a finish quality competitive in today's world market" and to be "consistent with the trend in the entire domestic auto industry" (J.A. 41); that the BC/CC system was no longer "innovative" technology by 1985 (J.A. 94); and that the reason for low emission rates at the new facility was, at least in part, the separate statutory requirement of a "lowest achievable emission rate" for a new facility in a nonattainment area (42 U.S.C. 7502(b)(6), 7503(2)). Furthermore, construction of the new facility does not necessarily justify the continuing high rate of emissions from the old facility after the SIP compliance date and before petitioner closed it. Finally, petitioner's comparison of the $20 million cost of placing emission controls on the lacquer lines with the $200 million cost of the BC/CC system (Br. 6 & n.3) overlooks the fact that the $20 million figure represents the cost of pollution controls, while the $200 million figure represents the cost of an entire replacement coating facility which petitioner desired to install, at least in substantial part, for competitive reasons unrelated to pollution control (J.A. 41).

4. Petitioner's third policy argument (Br. 37-40) is that an enforcement bar is needed to preserve the integrity of EPA's SIP review process. However, the speculative possibility that an enforcement action could undermine even-handed administration and influence the outcome of the final decision on a SIP revision stems not from agency delay but from Congress's decision to assign both enforcement and SIP review responsibilities to the same agency (Pet. App. 16a-17a). Congress evidently concluded that the two functions could be carried out fairly by the same agency. Moreover, Congress provided an adequate remedy for anyone aggrieved by an allegedly biased decision by providing for review of final agency decisions in the courts of appeals. § 307(b)(1); 42 U.S.C. 7607(b)(1). See also *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994, 1010 (7th Cir. 1980) (appropriate remedy where enforcement considerations may have improperly affected EPA's decision on delayed compliance order is vacation and remand to agency under Section 307(b)). Indeed, petitioner has filed suit under Section 307(b) to challenge the propriety of EPA's denial of the SIP revision in

this case (*supra* at n.8).[44] This Court should reject the invitation to create an additional remedy to address this asserted problem, especially one as broad as a complete preclusion of enforcement whenever EPA has taken more than four months to act on a SIP revision. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it") (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)). See also *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 574 (1979) (the Court is

[44] Petitioner's particular allegations challenging EPA's denial of the proposed SIP revision will be considered in that action with the benefit of a full record, and are not properly considered here. Once again, however, because petitioner repeats those allegations so persistently, a brief comment on two points is warranted. First, petitioner claims that a reference in the December 2, 1986, notice of proposed disapproval to "an enforcement mechanism" is evidence of improper commingling of functions. Br. 38 n.48. See J.A. 96 ("This disapproval will prevent GM from deferring the topcoat and final repair compliance dates (from December 31, 1985 to August 31, 1987) by revising the State regulation. Extensions of the December 31, 1985 date should instead be obtained through an enforcement mechanism."). However, the reference is simply to the Delayed Compliance Order (DCO) procedure, spelled out in the enforcement section of the Act (§ 113(d); 42 U.S.C. 7413(d)). A DCO contains a schedule with increments of progress that ensures compliance as expeditiously as practicable, and has several other advantages over a SIP revision, which does not provide the same certainty of expeditious compliance. Congress contemplated that extensions would generally be handled through this procedure (see H.R. Rep. No. 294, *supra*, at 56-58), and extensive negotiations regarding a possible DCO took place while EPA was reviewing the proposed SIP revision (J.A. 75, 89). This reference to the DCO procedure in no way indicated that EPA had ceased to view the SIP revision proposal as a regulatory matter.

Second, petitioner emphasizes (Br. 38) that the final disapproval was published in the Federal Register on September 16, 1988, which was also the day that EPA's opening brief was filed in the court of appeals. (The Administrator had signed the final disapproval twelve days earlier, on September 4, 1988. 53 Fed. Reg. 36,014.) Petitioner's suggestion that this evidences some impropriety on EPA's part is without foundation, and, in any event, can be considered fully in the pending action challenging EPA's disapproval of the SIP.

"extremely reluctant to imply a cause of action * * that is significantly broader than the remedy that Congress chose to provide").

5. The *American Cyanamid* court explicitly rested its enforcement bar, in part, on a closely related policy argument – an asserted need to punish the agency for delay. See *American Cyanamid*, 810 F.2d at 499 n.9 (rejecting *Duquesne Light* approach because, under it, "EPA * * * pays no price for its contumaciousness"); Pet. Br. 21. That rationale fails for several reasons.

As an initial matter, careful EPA evaluation of proposed revisions, which must be issued for public comment and submitted to OMB review, will generally take substantially longer than four months. EPA has itself established timetables for agency action which are a far more realistic reflection of the underlying legal and administrative complexities presented by SIP revisions that may involve many federal, state, and private parties and that must also clear the hurdles posed by prevailing administrative law jurisprudence. In these circumstances, failure to observe a four-month timetable hardly merits automatic and severe judicially-invented punishment.

Moreover, as the court of appeals in this case noted, "[i]f the EPA cannot enforce existing standards, it is the public and not the EPA that is hurt." Pet. App. 14a. See also *Alcan Foil*, 889 F.2d at 1520 ("The public should not suffer because of EPA's failures."); D. Currie, *supra*, at 114 (result of *American Cyanamid* is that "the public is punished for the Agency's inaction"). Under the *American Cyanamid* rule, EPA is absolutely banned from enforcement actions after the four-month period and during the pendency of a SIP revision proposal. The Agency cannot enforce the approved SIP, even though it remains the "applicable implementation plan" (§ 110(d); 42 U.S.C. 7410(d)), and it cannot even enforce the proposed SIP because it is not yet the "applicable implementation plan." It does no disservice to the States to recognize that they are sometimes put under enormous pressure to accommodate major sources of employment. Congress recognized this fact of life when it pro-

vided for federal review of SIPs and SIP revisions.[45] An enforcement bar could encourage non-complying sources to propose, and States to submit, last-minute SIP revision proposals for the purpose of staying EPA enforcement actions and postponing compliance with SIP provisions which Congress required to be achieved within the deadlines set forth in the Act.[46] If existing SIPs cannot be enforced by EPA, noncomplying sources in States that propose revisions will gain unfair advantage over those in other States, and the public will suffer from further delays in attainment of national air quality standards, contrary to Congress's clear intent.[47] In light of the fact that EPA is rarely able to complete final action on SIP revisions within four months, adoption of the *American Cyanamid* rule would seriously undermine the Agency's ability to enforce the Act as Congress intended.

The facts of this case illustrate the negative results of an enforcement bar. Petitioner had more than ample time (five years) to bring its plant into compliance with the emission limits of the 1980 SIP either by installing control devices on its lacquer coating lines or by converting to the basecoat/clearcoat process without undue delay. Instead of making the investment necessary to achieve this result, petitioner waited until shortly before the deadline to propose a solution that by that time re-

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[45] Cf. *United States* v. *Ford Motor Co.*, 814 F.2d at 1102 ("[I]f state control of ambient air emissions were final, in short order, major shifts of smoke stack industries to states with the most lenient pure air standards would inevitably take place."). See also J.A. 125 (district court notes hardship to Framingham workers if "the plant was moved out of state").

[46] Cf. W. Rodgers, *supra*, at § 3.39 ("The decision in *American Cyanamid* extends to the polluter the profit from delay. • • • [T]he opinion may encourage SIP-submitters to develop the art of the 'unapprovable package,' replete with data shortages and loose ends • • •.").

[47] See, *e.g.*, H.R. Rep. No. 294, *supra*, at 72 ("The more [that] legal challenges to the regulations can delay enforcement, the longer any investments for control equipment can be deterred."); *Duquesne Light*, 698 F.2d at 463 (Congress added the Section 120 recoupment provisions in 1977, in part because "the expense of reducing emissions [was] making it profitable for industry to delay needed expenditures as long as possible").

quired a one and one-half-year extension of the SIP time limits. Allowing petitioner to follow this course of conduct without penalty would ignore the damage to the public interest caused by the one and one-half-year delay in reaching the stricter emission limits, and would give petitioner an economic advantage over companies that made the investments necessary to meet applicable limits in a timely fashion. Worse, adopting an enforcement bar could encourage other sources to propose last-minute SIP revisions, secure in the knowledge that EPA would not be able to enforce the deadlines of the existing SIP for a significant length of time.[48]

Most fundamentally, the punishment rationale—and the *American Cyanamid* rule generally—reflects a serious misconception of the court's role. Congress provided for enforcement of the "applicable" SIP (42 U.S.C. 7413(b)(2)), and made no exception for the situation when a proposed revision has been pending for more than four months. It is not the province of the judiciary to carve out such an exception based on notions of "what accords with 'common sense and the public weal.' " *TVA* v. *Hill*, 437 U.S. 153, 195 (1978). Cf. *National Crushed Stone*, 449 U.S. at 83 (" 'The question • • • is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended • • •' ") (quoting from *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977)).

Thus, neither the asserted concern for the role of the States, nor the claim of unfairness to industry, nor the stated need to discipline and punish the Agency justifies an enforcement bar. To the extent that such concerns are substantial, less drastic

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[48] The *Alcan Foil* court stated in dictum that "the court may assess penalties from the date of the notice of noncompliance" (889 F.2d at 1521). In fact, however, in a Section 113 proceeding, penalties may be assessed from the first day of violation (see, *e.g.*, *United States* v. *SCM Corp.*, 667 F. Supp. 1110, 1122-1123 (D. Md. 1987)); in a Section 120 proceeding, in contrast, as in *American Cyanamid*, the statute is explicit that administrative penalties accrue only from the date of a "notice of noncompliance" (§ 120(d)(3)(C); 42 U.S.C. 7420(d)(3)(C)).

remedies are readily available and are already provided by statute.[49] Accordingly, the court of appeals correctly reinstated the enforcement action against petitioner and remanded for consideration of appropriate penalties, if any.

We agree with the court of appeals (Pet. App. 15a, 17a) that the district court in setting penalties may consider the equities of the case along with the reasonableness of the period taken by EPA for processing the SIP revision and, if unreasonable, any resulting prejudice to petitioner. The reasonableness of any Agency delay will depend on a number of factors, including whether the SIP revision presented novel or complex issues, and whether the delay was caused by EPA or by other parties.[50] The district court will then have a full opportunity to take account of the various claims of unfairness which petitioner here asserts in favor of an enforcement bar.

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[49] As we noted in our brief in opposition to certiorari (at 14-15), Congress is currently considering proposed amendments to the Clean Air Act regarding EPA review of SIP revisions. We will keep the Court apprised of any pertinent developments.

[50] Issues which may arise in future cases are context-specific, and per se rules would generally be inadvisable. The reasonableness inquiry should be informed, however, by the Agency guidelines on SIP revision processing (see p. 23, *supra*). While those guidelines have been adopted for internal Agency purposes and do not confer rights on other persons, they generally illuminate a proper reconciliation of the need for prompt action on SIP revisions with the need to comply with rulemaking requirements and to carry out the important review role that Congress intended.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

In addition to the statutory provisions set out in the Appendix to petitioner's brief, the following provisions of the Clean Air Act are pertinent.

1. Section 110(d), 42 U.S.C. 7410(d), provides:

(d) Applicable implementation plan

For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

2. Section 110(g), 42 U.S.C. 7410(g), provides:

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The

Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

* * * * *

3. Section 113, 42 U.S.C. 7413, provides in pertinent part:

(a) Finding of violation; notice; compliance order; civil action; State failure to enforce plan; construction or modification of major stationary sources

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrtor may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

* * * **

(b) Violations by owners or operators of major stationary sources

The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person –

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement * * *.

* * * * *

4. Section 172, 42 U.S.C. 7502, provides in pertinent part:

(a) Expeditious attainment of national ambient air quality standards

(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(1) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) Requisite provisions of plan

The plan provisions required by subsection (a) of this section shall –

(1) be adopted by the State (or promulgated by the

Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this title) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

* * * * *

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